SUPREME COURT, U. S.

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FILED
AUG 29 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 496

AMALGAMATED TRANSIT UNION, AFL-CIO, *Appellant*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees,*

and

AMERICAN BUSLINES, INC., and NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, *Intervenor-Appellees.*

On Appeal From The United States District Court For the District of Columbia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the District of Columbia, entered on May 4, 1966, which affirmed an order of the Interstate Commerce Commission, and submits this Statement to show that the Supreme Court of the

United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the court below is reported at 253 F. Supp. 481, and it may be found as Appendix A attached hereto. The two opinions of the Interstate Commerce Commission involved herein are reported at 90 M.C.C. 173 (1962), and 97 M.C.C. 426 (1964), the latter of which is attached hereto as Appendix B.

JURISDICTION

This suit was brought under 28 U.S.C.A. Sections 1336, 1398, 2321-2325, and 2284, to set aside and vacate an order of the Interstate Commerce Commission. The judgment of the three-judge District Court was entered on May 4, 1966, and the notice of appeal was filed in that court on June 30, 1966. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C.A. Section 1253. The following decisions sustain the jurisdiction of this Court to review the judgment of the District Court: *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169 (1961); *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142 (1950); *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373 (1943); and *United States* v. *Lowden*, 308 U.S. 225 (1939).

STATUTES INVOLVED

The statutory provisions involved in this appeal are Sections 5(2)(b), (c) and (f) of the Interstate Commerce Act, 49 U.S.C.A. Sections 5(2)(b), (c), and (f). The provisions are attached hereto as Appendix C.

QUESTIONS PRESENTED

(1) Did the court below err in upholding the Commission's interpretation of Section 5(2)(c) of the Interstate Commerce Act, which interpretation denies to motor carrier employees adversely affected by a Section 5 transaction protective conditions that have regularly been considered as necessary to the fair and equitable treatment of the interests of railroad employees suffering the identical adverse effects?

(2) Did the court below err in failing to conclude that Section 5(2)(c) of the Act, as interpreted and applied by the Commission in this case violates the Due Process Clause of the Fifth Amendment of the Constitution of the United States and is unconstitutional, for the reason that the Section arbitrarily and capriciously classifies motor carrier employees, and effects invidious discrimination against them in the protection afforded against losses incurred as a result of the transfer of motor carrier operating rights under Section 5 of the Act?

(3) Does the decision and judgment of the court below violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States in that the decision and judgment is void of any findings based upon evidence of record, and that the decision and judgment is instead premised on matters *de hors* the record which were never presented to the Commission, were not relied upon by the Commission and which Appellant was not afforded the opportunity to meet, rebut or answer?

(4) Did the court below err in failing to conclude that the Commission arbitrarily and capriciously relied upon the same ground previously relied upon and deter-

mined adversely to it by a three-judge District Court in a prior appeal, to deny protective conditions against the loss of wages and reduction in earnings suffered by the employees?

(5) Did the court below err in failing to conclude that the Commission's findings against the need for comprehensive employee protective conditions were without any basis in the record, arbitrary and capricious, and contrary to law?

STATEMENT OF THE CASE

Introduction

This case involves a denial by the Interstate Commerce Commission of employee protective conditions in a motor carrier transfer proceeding under Section 5(2) of the Interstate Commerce Act, 49 U.S.C.A. sec. 5(2). Appellant Amalgamated Transit Union, AFL-CIO (sometimes referred to hereinafter as "Amalgamated"), as the bargaining representative of the bus drivers affected, sought from the Commission the same measure of protection for the employees as the Commission has customarily afforded railroad employees adversely affected in the same ways. The Commission has refused to grant the protection requested. Because of this refusal the employees have suffered losses in wages, reduction in earnings, additional moving costs and living expenses, and other burdens, against which they are unprotected.

The Transfer Proceeding Before The Commission

This case began on November 18, 1958, when American Buslines, Inc., made application to the Commission for approval under Section 5(2) of the Act to sell and

transfer certain of its operating rights to two other carriers, Midwest Buslines, Inc., and Continental Tennessee Lines, Inc. Amalgamated, on behalf of the bus drivers represented on American, intervened in the Commission proceedings under authority of Section 17(11) of the Act, 49 U.S.C.A. sec. 17(11). Amalgamated argued, *inter alia,* that if the application were approved, the Commission should impose, as a condition to the approval of the transfer, certain provisions for the protection of the employees whose jobs were being transferred to the other carriers, including provisions protecting them from loss of earnings resulting from displacement, monthly allowances for dismissed employees, and severance allowances, all in accordance with the Commission's regular practice in railroad cases under Section 5.

After hearings were held on the application, first a Hearing Examiner and then the Commission on November 12, 1959, granted the application but denied the specific protective conditions requested by Amalgamated. Instead, a three year "reservation of jurisdiction" was imposed by the Commission in order to give Amalgamated the opportunity to establish subsequently that the bus drivers had suffered adversly from the approved transaction. See 80 M.C.C. 681 (1959).[1]

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[1] At the time of the hearing before the Hearing Examiner, the American drivers were on strike against American. Thus, it could not be readily determined what adverse effects they would suffer if and when they returned to work with American after the sale of the routes. The Commission has commonly imposed similar "reservations" in motor carrier cases, and until 1946, the Commission had also done so in railroad cases. See *Chicago & Northwestern Railway Merger,* 261 I.C.C. 672, 675 (1946).

Amalgamated's Petition To Reopen The Record and Commission Hearings Thereon

On April 11, 1960 Amalgamated requested that the Commission reopen the record, that further hearings be held and that specific conditions be imposed for the protection of the employees. This petition was granted by the Commission and in January, 1961, hearings were held.

At the hearings before the Commission, Amalgamated's proof established the following facts concerning the adverse effects suffered by the American bus drivers:

Prior to the sale and transfer of American's operating rights to Midwest and Continental, American had employed 41 drivers on the routes at issue. With the sale consummated, and 41 fewer jobs available with American, 22 drivers who had lost their jobs exercised their master seniority with American and obtained new assignments elsewhere on American. In so doing, these 22 drivers displaced or "bumped" other less senior drivers who, in turn, "bumped" other junior drivers into new assignments. Amalgamated introduced into evidence before the Commission eleven exhibits depicting the earnings of drivers both before and after displacement, in order to illustrate the losses in earnings sustained. These statistical comparisons showed that the drivers, in many months after being displaced and after locating new assignments, earned substantially less than their average monthly earnings had been before displacement.

Many of the drivers affected had been employed by American in what was known as the "southern senior-

ity district", which was completely eliminated with the sale of the routes involved. Each of these drivers lost his employment in that district and had to move to American's "eastern seniority district" to remain employed. For some of these drivers, the first assignments available in the eastern district were lower-paying and irregular extra-board work. For others, even the availability of regular assignments did not assure equivalent earnings, and they earned less in many months than they had averaged before.

Of the 22 drivers, others had been employed in American's "central seniority district" prior to the sale. Because some assignments still existed in this district after the sale, and because they still had a home seniority district in which to bid, these drivers were restricted in securing assignments in the eastern district. Before these drivers could bid into the eastern district, they had to be in furlough status in the central district. Then if, once having secured an assignment in the eastern district, a job reopened in the central district which they were eligible to bid, the drivers had to return to the central district or forfeit all seniority rights.

Many of the central drivers did acquire furlough status and bid into the eastern district in search of better paying, more secure work. However, soon thereafter, jobs again reopened in the central district and they were forced to return. Amalgamated's evidence showed the results of these moves: for example, in one case the driver earned after the sale of the routes what he had averaged before in only three of the twelve months analyzed. For another, in only two of the twelve months studied was the driver able to earn what he had averaged before and, in one of those months, he

had to drive more than 4,000 more miles than he had previously averaged in order to achieve the higher earning level.

Testimony from the drivers themselves was also proffered by Amalgamated. Mr. Elmore's testimony may be cited as illustrative. Before the sale of his route, Mr. Elmore held down a regular run in the central district. He and his wife lived in a home they rented in Springfield, Missouri. When Mr. Elmore returned to work following the sale, he was unable to hold an assignment because he was continually "bumped" by more senior drivers. Finally he was furloughed in the central district and, in November, 1959, he was able to bid into the eastern district on a regular run. He worked in the eastern district until the end of June, 1960, when he was recalled to the central district where he had to take an extra-board assignment in Big Springs, Texas.

Mr. Elmore testified that for the first two months of his employment in the eastern district, his wife remained in Springfield, Missouri, because he was uncertain of the duration of his eastern district assignment. During these two months, he shared a hotel room in Pittsburgh, Pa. with several other displaced drivers. Subsequently, Mr. Elmore's wife joined him and they rented an apartment in Pittsburgh. Then, when he was recalled to the central district, he and his wife moved to an apartment in Big Springs, Texas, giving up their home in Springfield. Mr. Elmore's total wage loss for this period was $243.49. This does not include the $112.05 in wages lost while moving from Pittsburgh to Big Springs. His new accommodations cost him $12.50 more per month than he had paid in Springfield. He also incurred expenses in moving

his wife and household furnishings to the different locations.

Amalgamated, in presenting its evidence of adverse effects, did so on the theory that under Section 5(2) of the Act, motor carrier employees are entitled to the same measure of protection as the Commission has held to be "fair and equitable" for railroad employees under similar adverse circumstances. Accordingly, Amalgamated had tailored its proof to the Commission to demonstrate the likenesses between the losses in earnings, moving expenses and additional living costs incurred by motor carrier employees, and those incurred by railroad employees in similar Section 5 cases. Amalgamated proceeded on the assumption that if the needs of the two classes of employees are indistinguishable, and unless good cause can be presented for treating each class differently, then no reason appears for imposing in motor carrier cases conditions less protective than those ordinarily imposed in railroad cases.

Amalgamated's Proposed Conditions and The Commission's Denial Thereof

At the close of the hearings before the Commission, briefs were submitted by the several parties. In its brief Amalgamated set forth in detail the conditions it proposed to protect against the adverse effects sustained by the employees as established in the record.

(1). For employees who retained employment status but who were displaced from their former jobs, a monthly "displacement allowance" was to be paid if their actual monthly earnings in the new job were below the average earnings in the old job;

(2) For dismissed employees, those who lost their jobs entirely, either a monthly "dismissal allowance," equal to the displacement allowance, or a lump sum "separation allowance" based upon length of service would be paid;

(3) Protective conditions insuring against losses sustained in the sale of real estate, broken leases, and for reimbursement of moving and other expenses; and

(4) arbitration procedures to resolve disputes arising out of the application of other protective conditions.[2]

In May, 1961, a Hearing Examiner rejected the Amalgamated's request for a specific set of employee protective conditions. The Examiner found that drivers had in fact suffered adverse effects but he held that these adverse effects were not those against which the Commission, under "the established policy in motor bus cases," had provided protection. On appeal to the Commission, the Commission in March, 1962, affirmed the Examiner's Report. See 90 M.C.C. 173.

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[2] Amalgamated's specific formula of protective conditions was based on three sets of railroad conditions: (1) the Washington Agreement of 1936, see *United States* v. *Lowden*, 308 U.S. 225 (1939); *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173 (1961); (2) the "Oklahoma Formula," see *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, 179 (1944); and (3) the "Burlington Conditions," see *Chicago, Burlington and Quincy Ry. Co. Abandonment*, 257 I.C.C. 700, 704 (1944).

Amalgamated's proposed conditions appear at 90 M.C.C. at 188-192 (1962). An analytical comparison between these conditions, and the railroad conditions from which they were derived, appears at pp. 38-46 of Amalgamated's Brief to the Hearing Examiner, February 27, 1961, which brief is a part of the original record before this Court.

Judicial Review of Commission's Decision and Remand to the Commission

Thereafter, Amalgamated brought suit to set aside and vacate the order of the Commission to the extent that protective conditions were denied to the drivers adversely affected. By order and judgment dated August 2, 1963, a unanimous three-judge District Court for the District of Columbia set aside the Commission's order, and remanded the case for further proceedings. *Amalgamated Association* v. *United States,* 221 F. Supp. 958.

In the order vacated by the Court, the Commission had relied upon three separate and independent grounds, including a finding that the drivers had refused to avail themselves of alternative employment with American after the sale, and had, therefore, brought the injuries upon themselves as a matter of their own free "choice." 90 M.C.C. at 187. However, on appeal, the Court disagreed, and held "the grounds on which the Commission relied in denying relief were accordingly erroneous." 221 F. Supp. at 961. With respect to Amalgamated's claim that motor carrier employees are entitled to the same measure of protection as railroad employees, the Court held:

> "But we think that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of American Buslines, Inc., without a reasoned explanation of its denial, consistent with what has here been said." 221 F. Supp. at 961.

Upon remand, the Commission reopened the matter "for reconsideration on the record as made." No further hearings were held, and no additional testi-

mony was taken or evidence received. On August 17, 1964, the Commission rendered its decision which is reported at 97 M.C.C. 426, and is set forth in Appendix B, *infra*.

In this latest decision, the Commission again refused to condition its order upon the conditions proposed by Amalgamated. Because of the Commission's treatment of the case at this point, the issues may be divided into three separate categories.

First, for the drivers who had to accept poorer paying and irregular assignments elsewhere with American, the Commission made no provision whatever for their losses in earnings. This was because, the Commission held, "the lesser wages . . . resulted from their own choice not to accept employment paying more than they were then earning" with American. 97 M.C.C. at 439. This is precisely the same ground relied upon previously by the Commission, and one of the reasons rejected by the Court as inadequate and erroneous in the first appeal.

Second, for the less senior drivers who had been "bumped" by one of the 22 other drivers, the Commission found it "unnecessary and inappropriate to provide benefits to them" because "the adverse effect, if any, seems impossible to ascertain, minor in extent and difficult to attribute to this transaction." 97 M.C.C. at 441 n. 6.

Third, the only protective condition imposed by the Commission was one providing "a lump-sum payment approximately equal to the cost incurred in moving their households." This proviso was drastically limited in that it was effective for only one year, and because it contained no provision for losses sustained in the sale of real estate, or for additional costs in the forced termination of leases.

The Judgment from Which This Appeal Is Taken

Both American and Amalgamated sued to set aside and vacate the Commission's latest order, with American and the National Association of Motor Bus Owners being granted leave to intervene in Amalgamated's suit. Amalgamated's basic claim was that the drivers were entitled to the same measure of protection railroad employees would have received under the same circumstances, and that the Commission had flouted the Court's directive by failing to give a "reasoned explanation" why motor carrier employees were not granted this relief. Amalgamated's brief to the court established how the Commission's order deviated from the course which would have been followed in a railroad case, and that the protection which was granted was substantially less than that accorded railroad employees similarly situated. Amalgamated also showed that the Commission had, with respect to the first category, reiterated a ground relied upon previously and rejected, and that the Commission's findings not only lacked support in the record, but were contrary to the record and based on matters *de hors* the record.

A three-judge Court affirmed the order of the Commission on employee protection.[3] The Court held that the standard of what is "fair and equitable" for motor carrier employees is not to be found in what is fair

[3] After the American and Amalgamated suits had been filed, the International Brotherhood of Teamsters filed an action against the Commission, C.A. 894-65, in the same court, and raised issues concerning the protection accorded truck drivers adversely affected by transfer proceedings under Section 5 of the Act similar to those raised herein. That action was consolidated with the other two suits, and the single opinion rendered by the court covers all three suits. We are advised by counsel that an appeal has been taken in that action also and that a Jurisdictional Statement will be filed by the IBT in this Court presently.

and equitable for railroad employees, that the Commission is not required under Section 5 of the Act to follow the railroad conditions as a guide to the protection given motor carrier employees, and that the Commission's policy of distinguishing between the two classes of employees is supported by a rational basis. In an effort to support these conclusions, the Court found that the needs of motor carrier employees are not as great or as pressing as those of railroad employees, and therefore less protection for bus drivers is permissible. It is from this decision and judgment of the court below that this appeal is taken.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Introd ction

The primary issue in this case is one which goes to the basic philosophy behind the Interstate Commerce Act of even-handed regulation of competing modes of transportation. That issue is whether the Commission under Section 5 of the Act may be permitted to deny protective conditions to motor carrier employees under circumstances that would not have warranted denial of the same measure of protection to railroad employees similarly situated. If the order of the Commission and of the Court below, to the effect that the Commission is not required to impose the same measure of protection to both classes of employees, is correct, then a serious and substantial constitutional question is presented respecting the interpretation and application of Section 5 of the Act. Section 5, as already construed by the Commission, requires "fair and equitable" treatment of both classes of employees. If what is "fair and equitable" for bus drivers is something other than, and substantially less than,

what is "fair and equitable" for locomotive engineers, then Section 5 is unconstitutional. For, as will be shown, that distinction cannot be supported by any reasonable statutory purpose.[4]

This is the first occasion for the issue of protective conditions for motor carrier employees to be before this Court. However, there is nothing episodic in the effort by the Amalgamated to gain fair, reasonable and adequate protection for the American bus drivers.

Amalgamated is the predominant union in the passenger transit industry. It represents more than a hundred thousand bus drivers and other employees in both local and inter-city transit in all parts of the United States. For example, the employees of the Greyhound Bus System, and many of the employees of the Transcontinental Bus System, the system with which American is affiliated as a wholly-owned subsidiary, are represented by Amalgamated. For many years this union has seen the members of its locals adversely affected as operating rights have been traded back and forth among motor carriers. Since 1940,

[4] The doubt surrounding this issue is compounded by the conflicting positions taken on this question in the two appeals by counsel for the Commission. On the first appeal, counsel for the Commission conceded that the Commission does not have the discretion to deny protection to motor carrier employees under circumstances in which the Commission would not have denied protection in a railroad case. Counsel argued that protection had been denied to the American drivers not because they were motor carrier employees, but because of considerations which would have warranted denial of protection to railroad employees also. In the second appeal, counsel adopted a quite different position and stated on brief to the court below that "What is fair and equitable for railroad employees . . . provides no standard for the minimum fair and equitable protection the Commission must grant to motor carrier employees."

Amalgamated has attempted to obtain from the Commission conditions attached to its orders, so that the employees could share in the benefits derived by the carriers from the transfers of operating rights, and so that these employees would not be adversely affected. Year after year the Commission has denied the relief requested.[5]

For railroad employees, the situation has been quite different. Since the 1930's, since even before the Act was amended in 1940 to specifically set forth in Section 5(2)(f) the protection deemed fair and equitable for railroad employees, see *Chicago, Rock Island & Gulf Railway Co. Trustees Lease,* 230 I.C.C. 181 (1938), *aff'd sub nom. United States* v. *Lowden,* 308 U.S. 225 (1939), railroad employees have been accorded comprehensive income protection and other protective conditions in Section 5 cases.[6] These railroad conditions were used as a pattern for Amalgamated's request to

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[5] The usual practice of the Commission in these motor carrier cases is to impose a "reservation of jurisdiction" only. See *e.g., The Greyhound Corp.—Control—Southeastern Greyhound,* 57 M.C.C. 123, 156 (1950). In *The Short Line, Inc.—Purchase—New England Transportation Co.,* 75 M.C.C. 33 (1958), and *Baggett Transportation Co.—Purchase—Hunt Freight Lines, Inc.,* 75 M.C.C. 147 (1958), the Commission granted a three-month severance allowance. In 1963, the Commission added to this severance allowance a three-month "displacement" or income protection allowance. *Indiana Motor Bus Co.—Purchase—Chicago, South Shore R.R.,*— M.C.C. —, Docket No. MC-F-8122 (1963). But, in neither the instant case, nor in the companion case, *Overnite Transportation Co.—Purchase—Rutherford Freight Lines, Inc.,* 97 M.C.C. 568 (1964), did the Commission grant a "displacement" allowance.

[6] The Commission has cited to this Court a near-hundred railroad cases in which comprehensive protective conditions have been imposed in Section 5 proceedings. See Appendix to the Brief of the United States and the Interstate Commerce Commission in *Brotherhood of Maintenance of Way Employes* v. *United States,* 366 U.S. 169 (1961).

the Commission, and it was these conditions which the Commission refused to impose in this case.

The capriciousness of the Commission's interpretation of Section 5, to deny to motor carrier employees the same measure of relief afforded railroad employees, is highlighted by a single Commission practice. In the United States, there are many bus drivers who are, because of the corporate structure of their employer, technically employed by railroad companies. Yet, these drivers are not otherwise engaged in railway labor; they drive buses for a living, or they work as bus mechanics. They are, as far as their job description is concerned, precisely like those drivers before this Court in this case. Notwithstanding these facts, and notwithstanding the identity of their employment and job function, the Commission treats these bus drivers as railroad employees and grants them railroad protective conditions. Amalgamated agrees these employees are entitled to this "fair and equitable" treatment. Obviously, they should not be treated differently simply because they drive a bus, rather than a locomotive, for a living. But, an important and substantial question of the application of Section 5, and of the continued administration of that Section by the Commission, is presented, when other bus drivers, no differently situated, are arbitrarily denied protection because they are motor carrier employees.

1. *The Statutory Requirement of a Parity of Treatment.* There can be little question that the Commission's denial of protective conditions to motor carrier employees deviates from the Congressional purpose. As originally enacted, the Interstate Commerce Act applied only to the railroad industry. In 1935, the Motor Carrier Act, 49 Stat. 543, was passed, and it became Part II of the Interstate Commerce Act in

1940. See 54 Stat. 919. The Motor Carrier Act brought the motor bus and trucking industries under the control and regulation of the Commission. Sections 212 and 213 of the Motor Carrier Act, 49 Stat. 555, conferred upon the Commission the same basic control over the transfers of motor carrier operating rights as existed under Section 5 for the railroads.

The legislative history of the Motor Carrier Act reflects clearly the Congressional intent of even-handed regulation of both forms of transportation. The Federal Coordinator of Transportation cited, as one of the primary reasons for the new legislation, the oversupply of unregulated transportation facilities in competition with the well-regulated railroad industry. His proposal was to bolster the competitive position of the railroads, whose financial position was of national concern, by regulation of the motor carrier industry on terms equal to the regulation of the railroads.[7] But, this was not to be accomplished at the expense of the employee interests: "fair treatment of labor" was to be recognized and promoted.[8] Unquestionably, this

[7] Hearings on S. 1629 Before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. 50 (1934). In 1928 and 1932 the Interstate Commerce Commission had made exhaustive studies of the motor carrier industry, the effect of its competition on the railroads, and the need for federal regulation. See *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685 (1928); *Coordination of Motor Transportation*, 182 I.C.C. 263, 379 (1932). See also Magnuson, "The Motor Carrier Act of 1935: A Legislator Looks At The Law," 31 Geo. Wash. L. Rev. 37, 40-41 (1962).

[8] Hearings on S. 1629 Before The Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. 51 (1934). See also Eastman, *Report of the Federal Coordinator of Transportation, 1934*, H. R. Doc. No. 89, 74th Cong., 1st Sess. 8 (1935). This Report, and the statement of objective set forth therein, is also referred to in the Senate report accompanying favorable action on the Eastman bill, S. Rep. No. 482, 74th Cong. 1st Sess. 3 (1935).

conclusion was based in part upon the Commission's own findings that unrestrained and unregulated motor carrier competition had the "tendency to break down wages and conditions of employment."[9] Representatives of labor likewise testified on the need for stabilized working conditions in the motor carrier industry, and in favor of a parity of treatment for both industries, so as to avoid continuation of the unfair competitive advantage held by the motor carriers.[10]

Through the years the Commission has, at best, paid scant attention to this legislative history. On the one hand, the Commission has stated, "the Act, taken as a whole, makes clear the congressional intent that public policy demands fair and equitable treatment of employees of motor carriers." *Short Line, Inc.—Purchase—New England Transp. Co.*, 77 M.C.C. 33, 37 (1958). And, in the first order in the instant case, the Commission held that its refusal to act "should not be construed as opposing in all instances" the imposition of railroad conditions for the protection of motor carrier employees. 90 M.C.C. at 188.[11] However, on the other hand, as the Commission itself concedes, "In no instance . . . has the Commission imposed such conditions where only motor carrier employees were involved," *Ibid.*, and the Commission will not impose such conditions "unless compelling reasons so dictate." 97 M.C.C. at 440. This is, it is

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[9] *Coordination of Motor Transportation*, 182 I.C.C. at 383.

[10] Hearings on S. 1629 Before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. 417, 423, 476, 542 (1934).

[11] Eleven years earlier, in *Hudson Bus Lines—Control—Boston & Maine Transportation Co.*, 58 M.C.C. 133, 135 (1951), the Commission stated that the parties to a motor carrier case should use the railroad conditions "as their guide" in reaching an agreement on employee protection.

respectfully suggested, something other than an even-handed interpretation and application of Section 5, and is wholly capricious and contrary to the statutory purpose. The correctness of this interpretation deserves this Court's attention, for maintenance of the competitive relationship between the competing modes of transportation turns in large part on this provision.

2. *The Constitutionality of Section 5.* If this Court finds no error in the Commission's interpretation and application of Section 5, which results in different standards of protection for motor carrier and railroad employees, a substantial constitutional question is presented involving the contravention of the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

The Commission has historically justified its denial of protective conditions to motor carrier employees on the ground that protection for railroad employees is "mandatory" under Section 5(2)(f), whereas for motor carrier employees under Section 5(2)(c) conditions are merely "discretionary."

The answer to this is two-fold. First, as the Commission held in *Short Line, supra,* p. 19, motor carrier employees are entitled to "fair and equitable" treatment also, just as railroad employees are entitled. Furthermore, nothing appears in Section 5, or anywhere else in the Act, to support the proposition that what is "fair and equitable" for motor carrier employees is protection substantially less than that afforded railroad employees as "fair and equitable."

Second, it would appear that the "mandatory"-"discretionary" dichotomy which the Commission now reads into the Act is actually a *post hoc* rationali-

zation formulated to obscure the discrimination practiced by the Commission against motor carrier employees.[11a]

Under former Section 5(4)(b) of the Act, 48 Stat. 217, the Commission was given general authorization only to impose conditions which would "promote the public interest." Acting on this general authorization alone, the Commission granted, with the approval of the Supreme Court, see *United States* v. *Lowden,* 308 U.S. 225 (1939), protective conditions which do not differ substantially from those which Amalgamated now seeks. This general authorization remains in the Act in Section 5(2)(b). The only difference is that today the Act spells out in Sections 5(2)(c) and (f) that the "interest of the carrier employees affected" is to be given specific weight, and that "fair and equitable" conditions are to be afforded.

If the Commission was impelled in *Lowden* to provide full protection for railroad employees at a time when the only statutory authority was a general one, it is hard to accept the Commission's present rationale which completely ignores the same general authorization in 5(2)(b), and rests exclusively on the specificity of 5(2)(f). The Commission has never explained, and certainly the court below did not, why the substantial protective conditions imposed in *Lowden* to promote the public interest in 1938, are not appropriate in 1966 to promote the same public interest, under the same showing of adverse effects.

[11a] The claim that conditions, beyond the statutory minimum, are "mandatory" under Section 5(2)(f) is not accurate. What is "fair and equitable" for railroad employees is not fixed. The history of railroad conditions has been one of continual expansion on a case-by-case basis. *Cf. Seaboard Air Line R.R.—Merger—Atlantic Coast Line R.R.,* 320 I.C.C. 122, 200-205 (1963).

This Court has held that the Due Process Clause embodies the standards requisite to constitutional legislative action, and the prohibitions against invidious classification and discrimination, found in the Equal Protection Clause of the Fourteenth Amendment. *Schneider* v. *Rusk,* 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954); *United States* v. *Petrillo,* 332 U.S. 1 (1947). In order to hold that Section 5 of the Interstate Commerce Act does not fall afoul of this equal protection standard, it must be determined that the distinction, which the Commission has held exists between the relief to be accorded the two groups of employees, is somehow related to the purposes served by the statute. Otherwise, Section 5 falls within the ambit of prohibited legislative action because the provision effects invidious discrimination against motor carrier employees as a class.

In the preamble to the Transportation Act of 1940, Congress declared the National Transportation Policy to include the encouragement of "fair wages and equitable working conditions." 54 Stat. 899. In Section 5(2)(b) of the Act, Congress authorized the Commission to impose "terms and conditions" which are deemed "just and reasonable," so as to mitigate the adverse effects upon employees of Section 5 transactions.

This Court has already examined the ways in which employee protection promotes the National Transportation Policy by encouraging adequate and efficient transportation service, and how employee protection helps develop, coordinate and preserve the national transportation system. See *United States* v. *Lowden,* 308 U.S. 225 (1939). To paraphrase the Court's decision is that case, unless the hardships caused to employees by Section 5 proceedings are mitigated, and

unless employees are afforded treatment which will assure high morale and which will reduce the possibility of an interruption to service by labor disputes, the Congressional scheme will necessarily falter.

The injuries sustained by the bus drivers in this case have been noted. Their losses in earnings, reduced wages, additional moving and living costs, do not differ from those suffered by railroad employees in a Section 5 proceeding. The Commission has acted to mitigate the damages of railroad employees. It has not done so for motor carrier employees. Section 5, as applied by the Commission, thus condones the placing of burdens on motor carrier employees which have been lifted from railroad employees. Nothing in the National Transportation Policy justifies this unequal protection of the law. The classification of motor carrier employees is discriminatory. This discrimination is invidious, it has no reasonable statutory basis or purpose, and it is therefore unconstitutional.

3. There is also presented in this case the substantial question of the proper standards by which Commission decisions, and appellate review of those decisions, are to be adjudged. For the fact is if the customary "substantial evidence of record" standards are used to test the validity of the Commission order and the court's affirmance of this order, the judgment of the court below must be reversed.

One of the general grounds relied upon, first by the Commission and then by the Court, to distinguish the protection required by motor carrier employees was "the expanding nature of the motor carrier industry, and the high degree of transferability of motor carrier employees within the industry." 97 M.C.C. at 440.

However, this Court may search in vain the record before the Commission for evidence probative on these critical findings. The carriers offered no evidence that the motor carrier industry is an expanding one, rather than a contracting one. And there was no evidence proffered to show that the American drivers possessed skills which were more transferable than those of railroad workers. Furthermore, the Commission's decision is barren of the requisite articulation of the relevance of these findings to the issue presented of whether the employees were entitled to protection for losses which even the Commission concedes they suffered.

It is as if the Commission took "administrative notice" of certain facts, and used these facts to determine the cause against Amalgamated. Amalgamated had no opportunity to meet, answer or rebut the claim that the motor carrier industry is an expanding one, or that the skills of bus drivers are easily transferable to other employment. Obviously, there are limits to what an agency may do in the name of administrative notice. ". . . [T]o press the doctrine . . . and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial." *Ohio Bell Telephone* v. *PUC*, 301 U.S. 292, 302 (1937). These limits have been exceeded here, and the denial of due process to Amalgamated could not be more clear.

The denial of due process to Amalgamated is also present in the court's reiteration of the same Commission findings. The court compounds the error by further stating that the needs of railroad employees are greater than those of motor carrier employees because "Displaced railroad employees meet with more difficulties in obtaining similar positions . . . ." Not even

the Commission went so far, and the court's conclusion appears to be of whole cloth.[12]

The court's treatment of the specific formula of employee protection awarded by the Commission to the American drivers, and of Amalgamated's objections thereto, is peculiar. All that the court states in reference to the American drivers specifically is:

> "The only financial loss to employees that the Commission could here attribute to the Midwest Buslines (sic) occurred with its employees who were required to change their place of residence .... The majority of the Commission has granted only such protection as the employees would have been entitled to had they followed their work, and such protection seems fair and equitable to employees of American Buslines."[13] 253 F. Supp at 484.

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[12] The court's opinion in this respect was undoubtedly based, in part at least, on certain representations made by the Government in its brief to the court which found no support in the record. The Government devoted considerable space in its brief to an examination of recent special consideration given railroad employees in other forums and by other bodies. Apparently, this was intended to justify the Commission's unequal treatment of motor carrier employees, even though the Commission itself had never alluded to this consideration as determinative. Amalgamated objected to this extra-record, *post hoc* rationalization by the Government, see *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962), but the court below nevertheless accepted these representations as fact and relied upon them.

[13] The court has apparently confused the carriers involved and the employer of the drivers adversely affected. The employees so affected were American drivers, not Midwest employees. Amalgamated was appearing on behalf of the American drivers who lost their jobs and who were compelled to take other assignments on American in order to remain employed. No "Midwest" drivers were required to change their place of residence.

This holding is vague, confusing and not responsive to what the Commission actually decided in its latest order. In the first place, the court had already held, on the previous appeal, that the American drivers were not required to "follow their work," by accepting offers of employment with Midwest and Continental, which had purchased the routes, because those offers did not include recognition of full seniority rights. 221 F. Supp. at 961. Secondly, as shown above, many American drivers did exercise their choice, when the opportunity presented itself, did bid assignments in other locales, did move their households and families, and did suffer losses, including reduced earnings, for which the Commission's protective conditions do not compensate. What the Court actually meant by this conclusion is not clear.

What the Commission did on the specific formula of employee protection was to treat separately three different issues. On none of these is the Commission's decision supported by the "substantial evidence" of record required for legitimate administrative action. See *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962); and *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81, 93 (1961).

(a) *Displaced Drivers Who Suffered Losses In Earnings.* The ways in which the American drivers, who lost their jobs by the sale of the routes, sustained losses in earnings, and the evidence of these losses, has already been detailed, *supra*, pp. 6-9. The Commission, *in its first order*, denied protection to these employees on the basis of a finding that they failed to take advantage of better paying jobs elsewhere on American, and therefore the injuries sustained were a matter of

their own free "choice." 90 M.C.C. at 187. On appeal from this first order, the court held that all "the grounds" relied upon by the Commission "were accordingly erroneous," and reversed and remanded. 221 F. Supp. at 961. On remand, the Commission repeated, as the reason for denying protection to these displaced drivers, the same ground litigated adversely to it: "the lesser wages . . . resulted from their own choice not to accept employment paying more than they were then earning." 97 M.C.C. at 439. Patently, the court below erred in failing to apply the principles of *res judicata* on this issue, and by letting stand in favor of the Commission a ground which had been litigated adversely to it previously.

The displaced drivers had no "choice" in this matter. Those who had been employed in the "southern" seniority district had nowhere else to bid and were compelled to accept assignments in the "eastern" district where many were unable to earn as much as they had averaged before the sale. "Central" seniority district drivers, who still had bidding rights, did not "choose," in the voluntary sense implied by the Commission, to "ride-out bids and not move to the carrier's eastern district," as the Commission states, 97 M.C.C. at 433. They were in fact required by contract to remain in their home seniority district unless and until furloughed in that district, and then and only then were they permitted bidding rights into the "eastern" district. As shown above, even when this happened and they secured these new bidding rights, they were still unable, for many months, to earn as much as they had averaged before. The conclusions of the Commission to the contrary are not only not supported by substantial evidence, they are indeed contrary to the record.

(b) *"Bumped" Drivers.* The Commission refused to grant any conditions for the protection of the drivers who, because of their lower seniority ranking, were "bumped" by the 22 other drivers who lost their jobs because of the sale. 97 M.C.C. at 441 n. 6. Under the circumstances of this case, this disposition is particularly unfortunate.

At the hearings before the Commission, Amalgamated attempted to introduce into evidence specific illustrative examples of employees who had been bumped into lesser paying or otherwise less desirable jobs. But, on objection from the carriers, Amalgamated was refused the opportunity to do so by the Hearing Examiner, and Amalgamated was limited to an offer of proof on this point. It is grossly unfair now for the Commission to hold the adverse effects seem impossible to ascertain, minor in extent and difficult to attribute to the transaction. This was the Commission's doing, not Amalgamated's, and the court below erred in failing to rectify the matter.

Before the court below, the Commission conceded that "there may have been bumpings." But, the Government went on to contend that the record did not show these bumpings were "unavoidable," or that they "resulted directly from the transaction." Again, the record is otherwise, and does not support the Commission's contention. Both drivers who testified at the hearing, one from the "southern" district and the other from the "central," testified they had bumped other less senior drivers when they took jobs in the "eastern" district. One even testified that he had himself been bumped by a more senior driver after the

sale and that this was one of the reasons why his earnings were lower.[14]

(c) *"Lump-Sum" Settlement Allowance.* The Commission, in imposing a limited form of protection as a "lump-sum" settlement allowance, departed from its customary practice in railroad cases and, without any reasoned explanation whatever, refused to grant conditions protective against the losses sustained in the forced sale of real estate and forced cancellation of leases. The Commission, again differently from its practice in railroad cases, also arbitrarily restricted the protection accorded by limiting the provision to a one-year period.

The Commission cites no basis in the record for these restrictions. There is no support anywhere in the record that excess rents and utility costs experienced by the displaced drivers abruptly ceased at the end of one year. Railroad employees receive protection in this regard for a full four years and the Commission, absent some reasoned explanation, should have

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[14] The treatment by the Commission of bumped drivers also illustrates the discrimination practiced by the Commission against motor carrier employees, as compared with railroad employees. In a recent railroad proceeding, the carrier questioned whether bumped employees were within the scope of the protective conditions granted railroad workers. The Commission's response was explicit:

> "It is definitely our intention that the protection afforded by the conditions shall be available to all employees dismissed or displaced as a result of a chain reaction resulting from the exercise of seniority rights by an employee whose job is abolished or whose work is transferred . . . Such 'secondary' results are within the scope of the conditions." *Southern Railway Co.—Control—Central of Georgia Ry.*, 317 I.C.C. 729, 730-731 (1963).

extended the same measure of relief to the motor carrier employees affected herein.

The Commission virtually conceded error in the court below by admitting that the Commission would have granted this additional protection to railroad employees. But, the Commission argued, because in certain other regards the drivers received more protection against certain other unrelated miscellaneous costs than railroad employees receive, the drivers cannot be heard to complain. Clearly, however, the equal protection of the law cannot be negated so facilely. Each injury must be weighed, and each item of protection examined, to determine whether the Commission has supplied the reasoned explanation required by law in granting or denying protection. Only after this has been done. may it be said that the protection ordinarily given railroad employees has been properly denied to the American drivers.[15]

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[15] One other ground was cited by the Commission in support of its denial of full protective conditions. The Commission, relying on data through the year 1958, attempted to portray a weakened financial status of American. The reasons why the Commission limited its view to that period are unknown. The annual reports of the carrier to the Commission from 1960-1964 reflect a quite different picture. In 1960 American had net income of $667,000, and an earned surplus of $650,000. By 1964, the earned surplus had increased to $1,500,000, on a net income of $500,000. The Commission can hardly contend that American lacks the wherewithal to pay employee protection. And no argument has yet been made why the employees should not share in the financial successes experienced by American since 1958.

CONCLUSION

For the reasons stated, the questions presented in this case are substantial, they are deserving of this Court's review, and jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

(Filed April 20, 1966)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 644-65

AMERICAN BUSLINES, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Civil Action No. 684-65

AMALGAMATED TRANSIT UNION, AFL-CIO, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

AMERICAN BUSLINES, INC., NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, *Intervening Defendants*.

Civil Action No. 894-65

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and LOCAL UNION 549, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

OVERNITE TRANSPORTATION COMPANY and RUTHERFORD FREIGHT LINES, INC., *Intervening Defendants*.

Opinion

James E. Wilson, Warren Woods, and Jon F. Hollengreen, of Washington, D. C., for the Plaintiff in C.A. 644-65 and for Intervening Defendant, American Buslines, Inc., in C.A. 684-65.

I. J. Gromfine and William B. Peer, of Washington, D. C., for the Plaintiff in C.A. 684-65.

Herbert S. Thatcher and David S. Barr, of Washington, D. C., for the Plaintiffs in C.A. 894-65.

William H. Orrick, Jr., Assistant Attorney General of the United States, and John H. D. Wiger, Department of Justice; David G. Bress, United States Attorney; Robert W. Ginnane, General Counsel, and Leonard S. Goodman, Assistant General Counsel, Interstate Commerce Commission; of Washington, D. C., for Defendants.

Robert J. Corber, of Washington, D. C., for Intervening Defendant, National Association of Motor Bus Owners, in C.A. 684-65.

J. W. Alexander, Jr., of Charlotte, North Carolina, and W. T. Croft, of Washington, D. C., for Intervening Defendants Overnite Transportation Company and Rutherford Freight Lines, Inc., in C.A. 894-65.

Before BURGER, United States Circuit Judge, and McGUIRE and CURRAN, United States District Judges.

CURRAN, J.: Two of these consolidated civil actions involve attacks by two labor unions upon orders of the Interstate Commerce Commission in *Midwest Buslines, Inc.—Purchase (Portion)—American Buslines, Inc.*, 97 M.C.C. 426, and in *Overnite Transportation Co.—Purchase—Rutherford Freight Lines, Inc.*, 97 M.C.C. 568, on the grounds that the Commission gave too little financial protection to adversely affected employees in certain financial transactions between motor carriers. The third action, filed by American Buslines, Inc., seeks to set aside the order entered in the *Midwest* case for the alleged reason that the Commission gave too much protection to the affected employees. These three actions are filed pursuant to 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325.

This is the second time that the *Midwest* case is before the Court, as neither the union nor the buslines company was satisfied with the order of the Commission on the remand. The *Overnite* case was filed by the Teamsters Union and is an attempt to reargue the legal issues presented in the first appeal of the *Amalgamated* case. In that case, the Commission approved the purchase of two of the American Buslines routes by Midwest Buslines and reserved jurisdiction for three years to entertain any employee petitions regarding needed financial protection from a possible adverse effect of the transaction. The purchase was completed December 31, 1959. On September 20, 1960, the Commission granted Amalgamated's petition to reopen the proceeding, allowing it to show "specifically how, and to what extent, particular employees of the carriers concerned have been adversely affected". The Commission declined to impose any conditions on behalf of the employees in the reopened proceeding.

This Court set aside the order of the Commission, stating it "need not attempt to delineate what measure of relief, if any, should be provided to the employees of American Buslines, Inc." and "that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated the Commission should not deny it to the employees of American Buslines, Inc., without a reasoned explanation of its denial, consistent with what has here been said". On the remand of the *Amalgamated* case, the Commission reopened its proceedings but stated that it was "for consideration on the record as made".

In August, 1964, the Commission issued its report on reconsideration. It conditioned its order upon payment by American of a "lump sum settlement" to certain of the employees to cover "loss of pay while moving, temporary maintenance of two households, and the excess of rents and utilities costs paid for a period of one year after the date